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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL GONZALEZ, JR.,

Defendant and Appellant.

B288310

(Los Angeles County
Super. Ct. No. NA102482)

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed and remanded with directions.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Daniel Gonzalez, Jr. of first degree murder, three counts of assault likely to cause great bodily injury, and possession of a firearm by a felon. Jurors watched video recordings of the assaults; defendant's confederate testified as part of a plea agreement; and three eyewitnesses identified defendant as the shooter. During closing argument, defense counsel acknowledged that defendant committed the assaults. Counsel argued that with respect to the murder, defendant acted in defense of his fellow gang members. Defendant's own statements showed that he was unaware of whether the homicide victim was armed; it was undisputed that defendant shot the victim in the back.

Throughout trial, witnesses were afraid to testify in this gang case. T.C., defendant's confederate who pled guilty, was beaten by fellow inmates on his way to court for his testimony implicating defendant. The trial court permitted the prosecutor to ask several witnesses questions concerning the witnesses' state of mind.

On appeal, defendant challenges as unduly prejudicial questions concerning an eyewitness's—A.J.'s—fear of testifying. The trial court admitted the evidence as probative of the state of mind of A.J. We conclude there was no error because the evidence was probative of A.J.'s credibility, and the trial court instructed jurors it could consider the evidence for the limited purpose of assessing A.J.'s state of mind.

Defendant correctly argues that the case must be remanded for the trial court to determine whether to exercise its newly

granted discretion to strike a Penal Code¹ section 667, subdivision (a) enhancement. We affirm and remand.

FACTUAL BACKGROUND

We summarize only the factual background relevant to this appeal.

Defendant is a member of the East Side Longo (ESL) gang. Hector Bejar and Jeffrey Carrasco also are ESL members.² T.C. is a member of the North Side Longo gang and an affiliate of the ESL gang. North Side Longo and ESL were friendly gangs. Crips were rivals to ESL.³

On August 23, 2015, around 10:00 p.m., defendant, Bejar, Carrasco, and T.C. entered a liquor store in the City of Long Beach. The liquor store was located in an area claimed by ESL gang members.

A fight followed Bejar's shouting the gang name, ESL. Defendant assaulted three victims. During the assaults, defendant raised his shirt to show his ESL tattoo. One assault victim used pepper spray against defendant and his confederates. After the victim used pepper spray, defendant ran to a car to retrieve a gun. Defendant returned to the liquor store with the gun.

Meanwhile, Andre Borero, A.J., and their two friends were together in a car and parked in the lot next to the liquor store. Borero exited the vehicle and pulled up his pants. According to

¹ Undesignated statutory citations are to the Penal Code.

² Bejar is sometimes spelled Behar in the record.

³ The People charged Bejar, Carrasco, and T.C. together with defendant. Defendant was tried separately.

T.C., Borero identified himself as a Linden Block Crips member, but no one else heard that identification. Borero may have associated with a Crips gang.

Defendant shot Borero in the back multiple times. Defendant or one of his confederates stated the ESL gang name. As they fled the scene, defendant and his confederates celebrated, saying “Woo, this is our hood.”

A.J. testified that she did not see Borero engage in any violence and that Borero did not have a weapon. Two additional eyewitness testified that Borero did not have a weapon. Officer Thomas Erdelji observed Borero lying on the ground. Erdelji did not observe Borero in possession of a weapon at that time.

Five bullets hit Borero. The fatal one penetrated Borero’s rib, lungs and heart. Borero’s autopsy revealed that he had cocaine and marijuana metabolite in his blood.

In a recorded interview played for jurors, defendant told a jailhouse informant that Borero “was going to trip on my homie. I said all right, bam, bam, bam.” “First, first shot I hit him, hit him, and like hit him in the back, like got him.” Defendant stated, “I seen him come out, I seen him come out like he was tripping, so I said: bam bam bam! Who knows? He could have had a burner. He could have had a knife. He could have stabbed one of my homies. Who knows, fool?”

The parties stipulated that defendant had been convicted of a prior felony.

PROCEDURAL BACKGROUND

Defendant’s first trial ended in a mistrial. The proceedings from the first trial are not included in the record on appeal. This appeal is based only on the record in defendant’s second trial.

In the second trial, defendant's counsel represented that the mistrial followed allegations that defendant's family members intimidated witnesses and their family members in the courthouse. The record in the second trial suggests that defendant's family members took pictures and videos of the prosecution witnesses in the hallway outside the courtroom during defendant's first trial.

T.C. pled guilty and testified against defendant as part of his plea deal. On the way to the courthouse for his second day of testimony, gang members beat up T.C. and injured his forehead and back. One of the assailants said that "if the homie didn't love you, this would have been worse and you'd be on the ground bleeding."

The person seated next to T.C. on the bus told an officer about the incident and reported that one person told T.C. "the homey still loves you and you could make it right." After the assailants beat T.C., T.C. testified that defendant said he shot Borero to "defend us." T.C. further testified that he was scared because he did not know what Borero would do; he did not know where Borero was "coming from." T.C. did not know if his confederates were scared.

A.B., another eyewitness repeatedly testified that she could not remember events. When it overruled defense counsel's objection to the prosecutor's leading questions, the court found good cause to believe A.B. lacked credibility in testifying that she did not remember.

Videos from four cameras were played for jurors.⁴ Three eyewitnesses, including A.J., identified defendant as the shooter.

⁴ These videos are not in the appellate record.

No witness testified for the defense. Defense counsel argued defendant acted in defense of his three confederates when he shot Borero. Counsel did not dispute that defendant committed three assaults prior to shooting Borero.

Jurors convicted defendant of first degree murder and found true gun enhancements pursuant to section 12022.53, subdivisions (b), (c), (d), and (e)(1). Jurors convicted defendant of three counts of assault by means of force likely to produce great bodily injury. The victims were Doe 1, Doe 2, and Doe 3. Jurors convicted defendant of possession of a firearm by a felon. With respect to all counts, jurors found true a gang enhancement within the meaning of section 186.22, subdivision (b)(1)(c). The trial court granted the prosecutor's subsequent motion to amend the allegations to fall within section 186.22, subdivision (b)(1)(a) (instead of subdivision (b)(1)(c)).

In a bifurcated proceeding, the trial court considered whether defendant had suffered a prior strike conviction that also qualified as a prior serious or violent felony and a prior prison conviction. Defendant admitted that he suffered a prior conviction for violating section 245, subdivision (c)(1) (assault with a deadly weapon or by means likely to produce great bodily injury upon a peace officer or firefighter).

The trial court sentenced defendant to 75 years to life for the murder. The court added five years for the section 667, subdivision (a) enhancement based on the prosecutor's representation that the court lacked discretion to strike the enhancement. The trial court sentenced defendant to a consecutive 18-year determinate term for the three assault convictions. Defendant timely appealed.

DISCUSSION

1. Defendant Demonstrates No Evidentiary Error

Defendant argues that the trial court should have applied Evidence Code section 352 (section 352) to exclude evidence that A.J. heard of an incident in which defendant's family members attempted to photograph witnesses as they waited to testify. Defendant recognizes that evidence a witness is afraid to testify is relevant to credibility but argues that "there was nothing about" A.J.'s "testimony that gave cause to question her credibility." We conclude the trial court did not err in admitting the testimony.

a. Additional background

Gang expert, Detective Chris Zamora, testified that gang members often will retaliate against people who testify against members of their gang. Gang members may retaliate even if the witness is not a gang member. Witnesses frequently are afraid to testify in a gang case and will pretend to forget or will alter their testimony.

A.J. was one of the eyewitnesses who identified defendant as the shooter. She was 16 years old at the time of the incident. Officer Robert Gonzales testified that prior to trial, A.J. was concerned about who would be present during the court proceedings. According to Gonzales, A.J. appeared nervous and did not want to testify. Gonzales testified that it is common for witnesses in gang cases to be nervous. Officer Gonzales testified that A.J. and another witness were concerned that someone would photograph or record them while testifying.

When the prosecutor asked A.J. about her identification of defendant in a six pack photographic lineup, A.J. testified that "it

was a belief. It wasn't sure." She then acknowledged that she had not told the officers she was unsure. A.J. testified that she did not see the assailant shoot Borero but later admitted that she saw the shooting. When the prosecutor asked A.J. if she was "nervous" to testify, A.J. responded, "No." A.J. testified that when she was served with a subpoena, she did not inquire who would be in the courtroom.

The prosecutor asked A.J. if she heard "about a[n] incident that happened last week in the courthouse," and she answered affirmatively. Outside the presence of jurors, the prosecutor indicated that he intended to elicit testimony that A.J. "heard from her mother that there were people connected to the defendant trying to take pictures of the witnesses." The prosecutor argued that the evidence was relevant to A.J.'s state of mind. The court permitted the questioning over defendant's counsel's objection that the evidence was unduly prejudicial, citing section 352. Counsel did not identify any specific prejudice.

A.J. then testified that she heard "people were taking pictures" of her and her family. A.J. heard this from the mother of another eyewitness. A.J. testified that she was not concerned that someone may have been taking pictures because she did not "know if it was done or not." The court instructed jurors: "Ladies and gentleman this testimony only goes to this witness's state of mind, and as she sits here and testifies, it does not go to the truth of the matter."

The trial court later denied defense counsel's motion for a mistrial based on the prosecutor's question that someone may have been taking pictures. Counsel identified no prejudice to defendant; he argued only that he was unaware of the

investigation concerning defendant's family members photographing witnesses.

Subsequently, defense counsel cross-examined A.J. and questioned A.J.'s lack of recall asking her, "Do you take medication," and "Do you usually have a problem with your memory."

b. Defendant demonstrates no error in admitting evidence relevant to A.J.'s state of mind

Evidence that a witness is afraid to testify and evidence that a witness fears retaliation is relevant to credibility. (*People v. Williams* (2013) 58 Cal.4th 197, 270.) "It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1450.) Defendant too recognizes that evidence of witness intimidation can be relevant in assessing a witness's credibility.

We conclude the trial court acted well within its discretion in finding the probative value of the evidence of questions concerning A.J.'s fear of testifying outweighed any potential prejudice in admitting the evidence. (*People v. Doolin* (2009) 45 Cal.4th 390, 437 [trial court's decision to admit evidence under section 352 reviewed for abuse of discretion].) Section 352 permits the trial court to exclude evidence if its probative value is outweighed by a substantial danger of undue prejudice. (*People v. Williams, supra*, 58 Cal.4th at p. 270.) " "Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or

shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption “‘substantially outweigh’” the probative value of relevant evidence, a section 352 objection should fail.” ’ ” (*People v. Doolin*, at pp. 438–439.)

Defendant argues that the evidence was irrelevant because A.J. “testif[ie]d] truthfully and to the best of her recollection, and there was nothing about her testimony that gave cause to question her credibility.” Defendant argues that the evidence “was clearly outweighed by the potential for prejudice, undue consumption of time, and confusion it would create” However, he identifies no prejudice for purposes of balancing the probative value and the prejudicial nature of the evidence. Nor does he explain how the brief questioning would have led to undue consumption of time or confusion.

Contrary to defendant’s argument, the evidence was relevant to A.J.’s credibility. Just before the questioning, A.J. testified that she did not see the person who shot the gun. Later on, she testified that she saw the shooter but “cannot say . . . who it was.” This discrepancy in A.J.’s testimony implicated her credibility. The evidence of witness intimidation provided an explanation for why she would vacillate in her statements about the shooter. It also provided an explanation for her seemingly inconsistent statements regarding identifying defendant in the photographic lineup. A.J. testified at trial that she “wasn’t sure” of her identification of defendant in the photographic lineup. She, however, acknowledged she did not tell officers administering the lineup that she was unsure. The fact that A.J. later testified that she was not nervous and did not know

whether “people” photographed witnesses does not alter the probative value of the prosecutor’s questions in light of A.J.’s inconsistent statements before and during trial.⁵

Section 352 required the trial court to balance the probative value and the prejudicial nature of the evidence. We have rejected defendant’s argument that the evidence lacked any probative value. Defendant identifies no prejudice against which to balance the probative value of the evidence. “[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.’” (*People v. Doolin, supra*, 45 Cal.4th at p. 439.) Under this standard, the trial court acted well within its discretion in concluding that evidence that “people were taking pictures” admitted only for the purpose of assessing A.J.’s state of mind was not of such a nature as to inflame the emotions of the jury. In short, defendant does not show the court abused its discretion in admitting the evidence. Because defendant demonstrates no evidentiary error, we need not consider his argument that the erroneously admitted evidence prejudiced him.

⁵ The trial court limited the jury’s consideration of the testimony to A.J.’s state of mind. The trial court instructed the jury: “During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.”

2. The Case Must Be Remanded For The Trial Court To Exercise Its Newly Obtained Sentencing Discretion

Under prior law, a trial court did not have the authority “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (Former § 1385, subd. (b).) Senate Bill No. 1393, adopted September 30, 2018, amended sections 667 and 1385 to omit this restriction, thus granting trial courts discretion to strike the prior conviction as it relates to the five-year sentence enhancement under section 667, subdivision (a)(1). (See Sen. Bill No. 1393 (2017–2018 Reg. Sess.); *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

The parties agree that Senate Bill No. 1393 applies retroactively to this case and that remand is necessary for the trial court to exercise its discretion and decide whether to strike the serious felony enhancement.

Remand is required “unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court’s intent, remand is required when the trial court is unaware of its sentencing choices.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) As both parties state, remand is necessary for the trial court to exercise its newly-obtained discretion. (*People v. Garcia, supra*, 28 Cal.App.5th at p. 973.) On this record, we cannot conclude remand would be futile.

DISPOSITION

The judgment of conviction is affirmed. Upon remand, the trial court shall determine whether to strike the section 667, subdivision (a) enhancement. If the court strikes the enhancement, the court shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.